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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RICHARD DON YOUNG,<br><br>Defendant and Appellant. | H045223<br>(Santa Cruz County<br>Super. Ct. No. S808528) |

## I. PROCEDURAL BACKGROUND

In the late 1990s, appellant Richard Don Young entered a plea of not guilty by reason of insanity (NGI). The facts underlying those charges are not relevant to this appeal. Young now appeals from an order extending his commitment pursuant to Penal Code section 1026.5, subdivision (b). After Young waived his right to a jury trial, the matter proceeded to a court trial on October 25, 2017.

During the trial, the court heard testimony regarding Young's mental illness from two experts. The court also heard testimony about Young's assault on a staff member at Napa State Hospital as well as his stated desire to harm himself and others. One expert, who assessed Young's future risk for violence, testified that Young has little to no insight into his mental illness, remains impulsive, and has refused to participate in his treatment plan. As a result, she opined that his risk for violence in the state hospital is moderate, more than moderate if released into the CONREP program, and moderate to high if released unconditionally in the community. She concluded that he is not currently eligible for admission into the CONREP program.

In contrast, an expert testifying on Young's behalf concluded that Young had made significant progress in controlling his violent behavior and that he was safe for release into the community. On November 2, 2017, the trial court granted the petition. Young filed a timely notice of appeal on November 6, 2017.

On appeal, we appointed counsel to represent Young in this court. Appointed counsel filed an opening brief which states the case and the facts but raises no specific issues. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 543-544 (*Ben C.*); *People v. Taylor* (2008) 160 Cal.App.4th 304.) Pursuant to *Ben C.*, on August 3, 2018, we notified Young of his right to submit written argument on his own behalf within 30 days. On August 23, 2018, we received a letter from counsel attaching a letter from Young. Due to clerical error, this court sent another notice pursuant to *Ben C.* to Young on September 5, 2018. When we received no response to the second letter, we dismissed the appeal as abandoned by order dated October 18, 2018, without reviewing the letter submitted on August 23, 2018. The remittitur issued on December 19, 2018.

On April 29, 2020, Young filed a motion to recall the remittitur on the grounds that the court did not consider or address his letter prior to dismissing the appeal. (*People v. Kelly* (2006) 40 Cal.4th 106.) In support of the motion, appellate counsel filed a declaration acknowledging that he had no justification for the delay in bringing the motion to recall the remittitur but admitted that he had only recently discovered the error while reconciling billing statements. We granted the motion to recall the remittitur to consider the letter from Young.

## II. DISCUSSION

In his letter to this court Young contends that his due process rights were violated. He complains that in a letter addressed to the trial court he requested transcripts of the original proceedings that occurred in 1998 and to personally question witnesses. He also contends that his trial counsel provided ineffective assistance of counsel because he

failed to provide Young with discovery including the transcripts, failed to ask questions requested by Young, and improperly advised Young to waive his right to a jury trial.

***A. Young's Requests for Transcripts***

In August 2017, Young communicated with the trial court first through his social worker and then by writing a letter directly to the trial judge. In both communications, Young expressed his desire for transcripts from the 1998 proceedings. In his August 23, 2017 letter, Young stated that he had asked his attorney for the transcripts and felt that he was "being intentionally misled" by his attorney who advised him that the transcripts had been destroyed. It does not appear that the court took any action related to the communications. Even if Young could argue that the court erred by not acting on his request, the error would be harmless. (Cal. Const., art. VI, § 13.) First, by his own admission, he had been advised that the transcripts had been destroyed, so there is no action the trial court could take to satisfy his request. Second, Young fails to explain how the transcripts would be helpful to him.

Young states that he wanted the transcripts in order to make a *Lomboy* claim. (*People v. Lomboy* (1981) 116 Cal.App.3d 67 (*Lomboy*).) In *Lomboy* the court held that a defendant must be advised that a commitment following a plea of not guilty by reason of insanity may exceed the longest possible term of imprisonment for the underlying crime. (*Id.* at pp. 68-69.) The remedy for failing to give such an advisement is either to render the commitment void or to provide defendant with a basis to withdraw his NGI plea. (*People v. Minor* (1991) 227 Cal.App.3d 37 (*Minor*); *People v. McIntyre* (1989) 209 Cal.App.3d 548.) However, courts are split on whether a defendant waives the right to raise this issue when he delays in doing so. (Compare *People v. Superior Court* (*Wagner*) (1989) 210 Cal.App.3d 1146, 1150-1154 with *In re Robinson* (1990) 216 Cal.App.3d 1510, 1514-1515.) Courts have found no waiver where a defendant's failure to raise the issue at his first extension hearing served to increase his sentence rather than to create a tactical advantage, and where a defendant showed he was unaware of the basis

for challenging his plea. (*Minor, supra*, 227 Cal.App.3d at p. 40 [defendant not told nor aware of the consequences of his plea until his first extension hearing, after which the lengthy delay in raising the issue only increased his time in custody].) Young made no argument in the trial court regarding his lack of knowledge of the consequences of his NGI plea in 1998 or the reason for the delay in raising a potential *Lomboy* claim, nor has he made these arguments here. Therefore, he cannot argue that the trial court erred in not addressing his request for transcripts.

***B. Ineffective Assistance of Counsel***

The remainder of the contentions in Young's letter address conduct by his trial attorney. Young is dissatisfied with counsel's failure to provide the records Young wanted and counsel's failure to ask the questions at trial that Young wanted asked. Young raised similar issues below. In his August 23, 2017 letter to the trial court, Young complained to the trial judge that counsel was not acting in Young's best interest and questioned whether his counsel was working for him "or the district attorney?" Besides the transcripts of his initial plea, Young does not describe what documents he wanted or what questions he wanted to ask, and he does not explain how those would have been helpful.

Young also contends that counsel wrongly advised him to waive his right to a jury trial. He states that counsel told him that the judge would rule in his favor if he waived his right to a jury trial. He now argues that this advice was intentionally misleading and, but for that advisement, he would have opted for a jury trial. The record Young cites in support of this argument contradicts the claim. In ruling, the trial judge told Young on the record that at the outset of the proceeding, "I went into this thinking I was probably gonna [*sic*] go the other way. Although I'm not supposed to prejudge cases, based on my discussions with the attorneys, I was thinking I'm probably going the other way. But I've got to go on the evidence here[, a]nd the evidence today is against you." If the judge himself believed that he would rule in Young's favor at the outset of the proceeding,

counsel's representation of that fact to Young cannot be misleading.

Even if Young could argue that counsel's conduct was deficient and not tactical, his ineffective assistance of counsel claim would fail. To show ineffective assistance of counsel, a defendant must show not only that counsel's performance was deficient, falling below an objective standard of reasonableness, but also that appellant was prejudiced thereby. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) Young is unable to show any prejudice. Young received a full trial with significant direct and cross-examination. Substantial evidence supported the order of commitment. There is no basis to conclude that additional documents, additional questioning or a jury trial, had he opted for one, would have yielded a different result.

Young having failed to raise any issue on appeal, we must dismiss the appeal. (*Ben C., supra*, 40 Cal.4th 529.)

## III. DISPOSITION

The appeal is dismissed.

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Greenwood, P.J.

WE CONCUR:

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Premo, J.

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Elia, J.

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